Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-876

ALBERT SAMUEL WRIGHT - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Louisville, Kentucky 40202
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December 16, 1977

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

ALBERT SAMUEL WRIGHT - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, ALBERT SAMUEL WRIGHT, respectfully prays that a Writ of Certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on October 27, 1977.

OPINIONS BELOW

The Order and Opinion of the Court of Appeals, entered on October 27, 1977 (Appendix A) is reported at —— F. 2d ——. The Order of the Court of Appeals overruling Petitioner's Petition for Rehearing was entered on November 22, 1977 (Appendix B). The Judgment and Commitment Order of the District Court

for the Eastern District of Kentucky at Covington (Appendix D), entered on February 22, 1977, is not reported.

JURISDICTION

The Order of the Court of Appeals for the Sixth Circuit (Appendix A) was entered on October 27, 1977; and a timely Petition for Rehearing was denied by Order of the Court of Appeals for the Sixth Circuit (Appendix B) on November 22, 1977. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was insufficient to establish *constructive possession* of the seized firearms where the evidence may have shown defendant lived in the residence but did not otherwise in any way link defendant to the seized firearms.

2. Whether the affidavit in support of the search warrant was insufficient to demonstrate probable cause where the anonymous informant was not alleged to be reliable and where the officer's observations were observations of innocent activity.

3. Whether a trial judge should be permitted to comment on the evidence when the defense presents *no* evidence, thus making a one-sided comment to the jury which may be construed to indicate the judge accepts the prosecution's proof and believes the defendant guilty.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides that,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fifth Amendment to the United States Constitution provides that,

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The charging statute in this criminal proceeding is 18 U.S.C. App. §1202(a)(1), Receipt, possession, or transportation of firearms, which provides as follows:

> (a) Any person who (1) has been convicted by a court of the United States or of a State or any

political subdivision thereof of a felony, . . . (5) . . . and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

This is a prosecution under 18 U.S.C. App. §1202 (a)(1), possession of a firearm by a felon. This case was tried before a jury in the Eastern District of Kentucky at Covington on January 24-25, 1977.

The indictment charged that Petitioner, having been previously convicted of a felony, "did receive and possess in commerce and affecting commerce two (2) firearms, that is, a 9 mm Llama semi-automatic pistol and a 12-gauge Remington shotgun." These two weapons had been seized by officers during a search of the "Premises of 631 Monmouth Street, Newport, Campbell County, Kentucky" conducted pursuant to a warrant on March 26, 1976. [Appendix F.] Petitioner was not present upon the premises at the time of the search.

At the trial, the prosecution failed to prove that Petitioner possessed or had ever possessed the seized weapons because no proof linked Petitioner to the weapons, except that there was some evidence to indicate that Petitioner may have lived at the searched premises.

At trial, the judge commented extensively on the evidence even though Petitioner had introduced *no* evidence, so that the jury mistook the judge's one-sided

comment for a judicial acceptance of the prosecution's evidence and belief in defendant's guilt. [Appendix G.]

The jury returned a verdict of guilty. The Sixth Circuit Court of Appeals affirmed the conviction, holding that: there was "substantial evidence [of] constructive possession"; the "affidavit for the search warrant did demonstrate probable cause"; and "other claims of error lack merit and need no discussion." [Appendix A.]

Petitioner respectfully requests that this Court grant certiorari as to the important questions raised herein.

REASONS FOR GRANTING THIS WRIT

1. This Court should decide whether "constructive possession" can be proven by evidence which may show that the defendant lived in the residence where the firearms were seized but which evidence *never* links the defendant to the seized firearms.

In the present case, no witness testified that the defendant was ever seen *with* the seized firearms. No witness testified that the defendant ever *admitted* ownership or possession of the seized firearms. No witness testified that the defendant was *at* the residence on the day the firearms were seized.

The only evidence adduced to possibly support a theory of constructive possession was as follows: at the time of the search, the defendant's wife was present at the premises; papers or documents bearing the defendant's name were found on the premises; outdated

city directories listed the searched premises as the defendant's address; the defendant was present at the premises on one occasion a few days after the search; there was men's clothing in the bedroom where the shotgun was found; prescription bottles bearing the defendant's name were found on the premises; letters and telephone messages and personal items bearing the defendant's name were found on the premises; and a neighbor testified that the defendant had lived in the searched premises for "3 or 4 years" but that the defendant was often absent for long intervals.

The evidence may have proven presence at a residence, but it certainly did not prove possession of seized firearms. *This Court's law is clear that proof of presence is not enough to prove possession.*

> Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function . . . , its connection with possession is too tenuous to permit a reasonable inference of guilt—*the inference of the one from proof of the other is arbitrary.* [Emphasis added.] *United States* v. *Romano,* 382 U. S. 136, 141 (1965).

In the present case, only the unreasonably arbitrary inference of possession from the possible proof of presence supports the defendant's conviction.

> All of the cases which deal with this issue and with which we are familiar have held presence alone, unillumined by other facts, to be insufficient proof of possession. *Id.,* 382 U. S. at 141.

Followed in *United States* v. *Wynn,* 544 F. 2d 786, 791 (5th Cir. 1977). *Accord, United States* v. *Gates,* 491 F. 2d 720, 721 (7th Cir. 1974). In the present case, the evidence may show presence, but that showing of presence is definitely not illumined "by other facts" to show possession.

Possession is a crucial element of the offense charged. [*See* statute, *supra,* at "Constitutional and Statutory Provisions Involved."]

> It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process. *Vachon* v. *New Hampshire,* 414 U. S. 478, 480 (1974).

In the present case, the conviction is based on a record lacking any relevant evidence as to the crucial element possession, so that the conviction violates due process. *See,* Fifth Amendment, United States Constitution. It is respectfully urged that this Court should grant certiorari in this case so that this unjust conviction may be reversed.

2. The affidavit [Appendix E] in support of the search warrant [Appendix F] was insufficient to demonstrate probable cause where the anonymous informant was not alleged to be reliable and where the informant's unreliable tip was not otherwise verified.

If an informant's tip is involved, then the probative value of the informant's tip must be demonstrated. *Aguilar* v. *Texas,* 378 U. S. 108, 114 (1964); *Spinelli* v. *United States,* 393 U. S. 410, 416 (1969); Fourth

Amendment, United States Constitution. In the present affidavit, the probative value of the informant's tip is never alleged. No statements demonstrating reliability appear in the affidavit.

This Court has held that an anonymous informant's tip may be found reliable other than by the affiant's statements demonstrating reliability. For instance, in the *Harris* case, this Court determined that the anonymous informant was credible because his statements to the police constituted declarations against penal interest. *United States* v. *Harris,* 403 U. S. 573, 583-584 (1971). In the present affidavit, the statements attributed to the anonymous informant were not declarations against penal interest, so credibility cannot be demonstrated *via* the *Harris* route.

An anonymous informant's tip may also be found to be reliable when sufficiently corroborated by police surveillance. *Spinelli* v. *United States, supra,* 393 U. S. at 418. In the present case, police surveillance confirmed no more than innocent conduct as to the defendant and the premises searched. The police observations *failed* to confirm incriminating activity, as follows: Larry Nixon and a man named Romeo engaged in conversation in front of the searched premises; Nixon handed "a grocery-size sack" to Romeo; Romeo handed money to Nixon; Nixon handed "a large bag" to Romeo; the sack or bag was carried in a red and white pick-up truck; some persons walked in a "surreptitious manner"; and some persons carried a sack or bag into a private residence.

> [W]e find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed. *Spinelli, supra,* 393 U. S. at 418.

In the present affidavit, all those police observations of innocent activity, together with an unverified tip, erroneously were found adequate to demonstrate probable cause to search for

> "(6) six handguns, (1) one riflle, and one shotgun and papers and records showing acquisition and disposition of firearms." [Appendix F.]

The search warrant was illegally issued because the affidavit, involving an anonymous informant, failed to demonstrate the informant's reliability in any way yet approved by this Court.

It is respectfully submitted that this Court should grant certiorari to consider whether the affidavit in the present case can possibly demonstrate probable cause based on an unreliable and unverified anonymous informant's tip.

3. After instructions were given to the jury, the trial judge commented at length on the evidence. [Appendix G.] It is well-known and widely accepted that a judge may comment on the evidence in a federal criminal case.

Petitioner, however, respectfully submits that this Court should review the propriety, fairness, and practical effect of a trial judge's comments on the evidence in a criminal case in which the defendant has presented

no evidence. In such a case, the judge reviews and repeats only prosecutorial evidence. The comment is necessarily one-sided, and the defendant's denial by silence can easily be overshadowed by the recapitulation of prosecution proof, so that the jury will forget to weigh the presumption of innocence as it must. The jury will conclude from the one-sided comment that the judge accepts the prosecution's evidence and believes the prosecution's case.

This Court has held that a trial judge's influence with the jury is tremendous.

> The influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, *and may prove controlling.* This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence should be so given as not to mislead, and *especially that it should not be* one-sided. [Emphasis added.] *Quercia* v. *United States,* 289 U. S. 466, 470 (1933).

In the present case, the defense presented *no* evidence. The judge's comments on the evidence were perforce *one-sided,* as this Court in *Quercia* found unacceptable.

This is a novel issue involving the right to due process. *See,* Fifth Amendment, United States Constitution. This Court should hear arguments as to the propriety, fairness and practical effect of a trial judge's one-sided comments in a criminal case in which the defendant has presented *no* evidence.

The present case is an ideal case for hearing because the trial judge's comments were so lengthy and one-sided as to completely overshadow the defendant's presumption of innocence.

CONCLUSION

Because the evidence was insufficient to establish a crucial element of the offense charged and Petitioner's conviction thereon violates due process, because the fruits of a search based upon an insufficient affidavit were admitted into evidence, and because the trial judge made one-sided comments on the evidence to control the jury's verdict, it is respectfully submitted that this Court should grant certiorari in this case and hear these important, timely, and novel issues.

Respectfully submitted,

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-5136

UNITED STATES OF AMERICA, - - - *Plaintiff-Appellee,*

v.

ALBERT SAMUEL WRIGHT, - - *Defendant-Appellant.*

ORDER—Filed October 27, 1977

Before WEICK, LIVELY and ENGEL, Circuit Judges.

Upon consideration of the briefs, appendices and oral arguments of counsel, we are of the opinion that the District Court did not err in denying defendant's motion for a directed verdict of acquittal. There was substantial evidence to the effect that the defendant was in constructive possession of the firearms, and the judgment of conviction was amply supported by substantial evidence.

We are also of the opinion that the District Court did not err in denying the motions to suppress, because the affidavit for the search warrant did demonstrate probable cause. Although the tip came from an anonymous telephone caller, it stated that he, the informer, had personally observed the firearms inside the defendant's residence on a certain date; that the firearms had been stolen from the Loft Apartments about a month previously; that large amounts of stolen property were being fenced by defendant and other persons at defendant's residence; that he had observed other stolen property; that he saw a shotgun being

taken from defendant's residence; that the guns had been stolen by Larry Nixon from apartment burglaries in Northern Kentucky; that defendant told the anonymous telephone caller that he was going to sell the guns in Cleveland, Ohio.

The Special Agent who executed the affidavit for the search warrant personally verified the accuracy of some of the information contained in the tip. The verification included the burglaries at the Loft Apartments where guns had been stolen, which guns had not been manufactured in Kentucky; that the Agent knew that the defendant was a convicted felon and had a reputation among federal and local authorities for fencing and gambling activities; that the Agent conducted a surveillance of defendant's residence, and on two occasions observed Larry Nixon, the thief, conferring with an associate of the defendant (the associate named Romeo), in front of defendant's residence; that on one occasion he observed a grocery-size sack pass from Nixon to Romeo, in exchange for money; that on the other occasion a large bag passed from Nixon to Romeo; that these bags had been brought to defendant's residence by Nixon in a red and white pick-up truck; and that both times Romeo carried the bags in a surreptitious manner into the residence of defendant.

In our opinion the affidavit for the search warrant was sufficient to authorize the issuance by the magistrate of the warrant. *United States* v. *Sevier*, 539 F. 2d 599 (6th Cir. 1976). The information obtained by the tip was adequately corroborated. *United States* v. *Edmond*, 548 F. 2d 1256 (6th Cir. 1977).

The other claims of error lack merit and need no discussion.

The judgment of conviction is affirmed.

ENTERED BY ORDER OF THE COURT
John P. Helman, Clerk
(s) Grace Keller, Chief Deputy

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-5136

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

ALBERT SAMUEL WRIGHT, - - *Defendant-Appellant.*

ORDER—Filed November 24, 1977

Before WEICK, LIVELY and ENGEL, Circuit Judges.

Upon consideration of the petition for rehearing, we are of the opinion that the various contentions of the appellant were adequately treated in our previous Order, and that said petition for rehearing should be and it hereby is denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk
By (s) Grace Keller,
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-5136

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

ALBERT SAMUEL WRIGHT, - - *Defendant-Appellant.*

ORDER STAYING MANDATE—Filed December 1, 1977

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman, Clerk

APPENDIX D

United States of America vs.

United States District Court for EASTERN DISTRICT OF KENTUCKY

DEFENDANT: ALBERT SAMUEL WRIGHT

COVINGTON

DOCKET NO. 76-40

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH DAY YEAR: February 22, 1977

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Frank Haddad (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of receiving and possessing in commerce firearms, having been convicted of a felony, in violation of Title 18 App., Section 1202(a)(1), United States Code.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWO (2) YEARS

IT IS ORDERED and ADJUDGED that the defendant be fined in the sum of $5,000 - TO BE PAID

SPECIAL CONDITIONS OF PROBATION

A presentence report was submitted to the Court before imposition of sentence and copies of the presentence report were furnished counsel pursuant to Rule 32, F.RC.P.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON

THIS DATE 2-22-77

By Dorothy D. Walsh

( ) CLERK

(X) DEPUTY

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Eugene E. Siler, Jr.

Eugene E. Siler, Jr., Judge February 22, 1977

GENERAL CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall, during the period of probation, conduct himself as a law-abiding, industrious citizen and observe all conditions of probation prescribed by the court. **TO THE DEFENDANT – You shall:**

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any change in your place of residence;
(6) follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

_____
United States Marshal.

By _____
Deputy Marshal.

APPENDIX E

AFFIDAVIT FOR SEARCH WARRANT—Filed October 26, 1976

BEFORE J. Gregory Wehrman, Covington, Kentucky.

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as 631 Monmouth, Newport, Kentucky in Campbell County, further described as: a two story dwelling, constructed of brick painted green, with a center door, painted rust color bearing the numerals 631. There are red curtains in the first floor windows, in the Eastern District of Kentucky there is now being concealed certain property, namely firearms, to wit: 6 handguns, 1 rife [sic] and 1 shotgun which are being possessed in violation of Title 18, Section 1202(a)(1) of the 1968 Gun Control Act and subject to seizure under Section 924(d) of Title 18 of the Gun Control Act, Chapter 44.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: On 3-24-76 at 4:30 pm, the following information was received from an anonymous telephone caller. The caller stated that the following firearms were observed inside the premises at 631 Monmouth: 6 handguns, 1 rifle and one shotgun. These firearms were seen by the caller at 4:00 pm on 3-24-76. The caller stated that the above firearms were stolen from the Loft Apartments approximately a month ago, and that said firearms were in the possession of Sammy Wright, Mary Dale Wright, John Romeo and Robert Mays. The caller further related that large amounts of stolen property were being fenced at 631 Monmouth by Wright and the other above named persons and described Sammy Wright as a white male in his sixties. While the

caller was on the premises, other stolen property was brought in to Wright by two unidentified persons. Robert Mays took a shotgun wrapped in paper from the premises. The caller also stated that the guns were stolen by Larry Nixon from apartment burglaries in the Northern Kentucky area and that Nixon sold the guns to Wright. Wright told the caller that he was going to sell the guns in the Cleveland, Ohio area.

The following investigative action and background information was developed by the affiant from the above information and previous investigation related to Sammy Wright, John Romeo and the premises of 631 Monmouth.

Samuel Albert Wright, aka Sammy Wright, was previously convicted in Covington Federal District Court on 10-4-71 for violation of Title 18, Section 1955 of the Organized Crime Control Act of 1970. He was sentenced to serve two years. He was subsequently released from prison on 1-3-75. Mary Dell Wright is the wife of Samuel Wright and is listed in the Williams City Directory as the owner of the New Plaza Lounge, 725 Monmouth, Newport and a resident of 631 Monmouth, Newport, Kentucky. John Romeo is a known associate of Sammy Wright. Surveillance of the premises of 631 Monmouth by the affiant in the months of January and February of 1976 have on two occasions produced observations of John Romeo conferring with Larry Nixon in front of 631 Monmouth. On one occasion I observed a grocery sized sack pass from Nixon to Romeo in exchange for money. On the other occasion, I observed a large bag pass from Nixon to Romeo. Both of these occasions occurred in front of 631 Monmouth; both times Nixon brought the bags in his red and white Ford pickup truck and both times Romeo carried the bags and conducted himself in a surreptitious manner while taking these bags into 631 Monmouth.

Wright, Romeo and Mays have a reputation amongst Federal and local law enforcement agencies for fencing and gambling activities.

On 3-25-76 a check of the records of the Kenton County Sheriff's department showed that two burglaries have occurred at Loft Apartments as follows:

Complainant Stphen [sic] Dickerson, Highknoll St., Ludlow, Kentucky (Loft Apartments) sustained an apartment burglary in which 3 Smith & Wesson revolvers were taken. No serial numbers available. Occurred in January, 1976. Complainant Mr. Stockstill, Highknoll St., Ludlow, Kentucky (Loft Apartments) sustained an apartment burglary in which one J. C. Higgins shotgun and a Stevens .22 rifle were stolen. No serial numbers available. The above firearms were not manufactured in the State of Kentucky.

Mr. Wright received and possessed in commerce and affecting commerce, firearms, having been convicted of a felony.

Based on the affiant's experience as a law enforcement officer for the past ten years, he feels certain from his observations and the accuracy of the information received that a fencing operation involving stolen firearms is being conducted by Sammy Wright at 631 Monmouth, Newport, Cambell County, Kentueky.

The reason that the citizen that reported this information wishes to remain anonymous is because of fear of retaliation from Sammy Wright.

(s) Gerald C. Gantenbein
Special Agent, ATF

Sworn to before me, and subscribed in my presence, 3-25-76.

(s) J. Gregory Wehrman

APPENDIX F

SEARCH WARRANT—Filed October 26, 1976

To Special Agent Gerald Gantenbein, U. S. Marshal, or any other authorized officer of the Bureau of Alcohol, Tobacco & Firearms

Affidavit(s) having been made before me by Special Agent Gerald Gantenbein

that he has reason to believe that on the premises known as 631 Monmouth Street, Newport, Campbell County, Kentucky, described as a two story brick dwelling, pained [sic] green, with a center entrance door, rust in color, bearing the numbers 631 with red curtains in the first floor windows, in the Eastern Judicial District of Kentucky, *there is now being concealed certain property, namely firearms, to wit: (6) six handguns, (1) rifle, and one shotgun and papers and records showing acquisition and disposition of firearms,*

and as I am satisfied that *there is probable cause to believe that the property so described is being concealed on the person or premises above* described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of 3 days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search in the daytime (6:00 a.m. to 10:00 p.m.) and if the property be found there to seize it leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and

promptly return this warrant and bring the property before J. Gregory Wehrman as required by law.

Dated this 25th day of March, 1976.

(s) J. Gregory Wehrman
Judge or Federal Magistrate

RETURN

I received the attached search warrant 3-25-76 and have executed it as follows:

On 3-26-76 at 3:55 o'clock P.M., I searched the person or premises described in the warrant and

I left a copy of the warrant with Mary Dell Wright together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

(1) Llama 9mm Pistol s/n 178353
(1) Remington 12 ga. Shotgun s/n 2444V
(1) Misc. papers, and phone directory

Tuesday
4:10
appro.

This inventory was made in the presence of Special Agents Rapier, Dowler and Munro.

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

(s) Gerald C. Gantenbein

Subscribed and sworn to and returned before me this _____ day of _____, 19____.

_____
Federal Magistrate

APPENDIX G

TRIAL JUDGE'S COMMENTS ON THE EVIDENCE

Now the evidence in this case for the United States is that on the date in question, as alleged in the Indictment, that Special Agents of the Alcohol, Tobacco and Firearms Division of the Treasury Department came to this address on Monmouth Street, and at this particular address executed a Federal search warrant. When they executed a Federal search warrant inside was Mrs. Wright, the wife of the Defendant herein. No one else was at home. So they searched the place, and inside a desk wrapped up in a piece of paper was a firearm, which is the Exhibit 2. It is a Llama automatic weapon which, according to the evidence of the Government, was made in Spain and turned up in Kentucky. Also upstairs, at least in a bedroom in the same building, was found a shotgun under a bed, and in this same room were found men's clothing—some discrepancy, one Agent said there were only men's clothing in that room and the other Agent said there were women's clothing all over the house, but at any rate this room where the shotgun was found under the bed was adjacent to a bathroom in which there were some prescription drugs, or drugs of some sort, or medicine that the Defendant was taking, and had the Defendant's name on these particular medicine bottles.

There is also some evidence that in the desk, or around the desk in which the Llama pistol was found, that there was some notes there to Sammy Wright, the same name as the Defendant, and that in or around this particular desk there were certain pieces of correspondence which were addressed to Mr. Wright at this same address.

It is the evidence also for the United States that this weapon upstairs, the shotgun, was manufactured in New

York State, and therefore it had to travel in interstate commerce before it arrived in Kentucky, since New York and Kentucky are separate states.

Now the evidence also for the United States is that although Mr. Wright was not there at the time that the search was conducted that there are indications throughout the house that he lived there, and also his name was found in two city directories leading up to this particular date to indicate that he in fact lived at this location. The United States also brought in a neighbor who said that Mr. Wright lived there for the last two or three years and still lives there, and there is also testimony by Special Agent Gantenbein that within the period of a week or less after they conducted this search of the house that he went to the house and Mr. Wright answered the door at this particular location, and that he had seen some mail going to this particular location in the last few days.

Now the evidence for the Defendant is that the United States has failed to prove the case and the Defendant in closing argument essentially admits that the Defendant of course has been convicted of a felony but that the Defendant was never shown to have been in the premises on the date in question, there is no evidence at all to link the Defendant with these firearms at all.

Therefore, these are the two conflicting viewpoints which you must resolve as jurors in this case, and if you find that the United States has proven its theory beyond a reasonable doubt then you should find the Defendant guilty. On the other hand, if you find that you do have a reasonable doubt as to the fact that the United States has proven its case then you should find the Defendant not guilty.